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COURT OF CRIMINAL APPEALS
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No. PD-0948-17

IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/30/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS,
Appellant

vs.

CRISPEN HANSON,
Appellee.

APPELLEE/RESPONDENT'S REPLY BRIEF TO STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-15-00205

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

TEXAS CASES

STATUTES AND RULES

STATEMENT OF FACTS

On January 16, 2015, Hanson pled guilty, pursuant to a plea agreement, and he was sentenced to eight years in prison. On June 11, 2015, the trial court, sua sponte, set the matter for a hearing to determine whether or not to suspend the remainder of Hanson's prison sentence and place him on community supervision. CR. at 336. The State did not object to the hearing. RR4 at 3. During the hearing, the trial court asked the State why it believed that **the trial court** did not have the authority to modify Hanson's sentence on its own and the State replied that Hanson had waived his right to have his sentence suspended. RR4 at 26. The trial court indicated that the State failed to address its question and the hearing continued. RR4 at 26. The State then argued that the trial court had made findings that Hanson agreed to waive his right to seek suspension of his sentence although the State acknowledged that the trial court's findings did not have language referencing the shock probation statute. RR4 at 28. The State further argued that although the matter of shock was being considered sua sponte by the trial court, in essence, Hanson was the one seeking suspension of his sentence because he was advocating for it. RR4 at 28-30.

At the conclusion of the hearing, the State reiterated its belief that, in essence, Hanson was the one requesting shock probation, and he had procedurally defaulted

that request by not filing the proper paperwork. RR4 at 53-54. It then argued that Hanson had waived his right to request shock probation and was unable to petition the trial court to grant shock probation. RR4 at 55. The State did not address, acknowledge or object to the trial court's authority to sua sponte grant shock probation. The remainder of the State's argument dealt with why it believed shock probation was not appropriate under the facts and circumstances of the case. RR4 55-56 (implicitly waiving its objection to the granting of shock probation). At the conclusion of the hearing, the trial court suspended further imposition of Hanson's sentence and placed him on community supervision for eight years. RR4 at 56. The trial court prepared a written order reflecting its decision along with a "First Amended Judgment of Conviction by Court" and "Terms and Conditions of Community Supervision." CR. at 343-352. All of these documents were filed on June 15, 2015. On June 25, 2015, the trial court filed an amended order suspending sentence which contained additional factual findings. The trial court did not prepare another "Amended Judgment of Conviction by Court" or "Terms and Conditions of Community Supervision." On July 13, 2015, the State filed a notice of appeal.

SUMMARY OF THE ARGUMENT

1. The Eighth Court correctly held that the trial court's order granting shock probation on June 15, 2015 is the "modification" of the final judgment or conviction that gives rise to the State's right to appeal under Article 44.01(a)(2). The amended order relied on by the State to salvage its appeal only added findings of fact and it did not modify the amended judgment or conditions of community supervision entered on June 15, 2015.

2. The Eighth Court correctly held that the three orders signed and entered by the trial court on June 15, 2015, were the only "modification" of judgment the State was entitled to appeal. In those three orders, the trial court granted shock probation, amended the original judgment of conviction to reflect the granting of shock probation and established the terms and conditions of community supervision. The June 25th order from which the State attempted to appeal did nothing other than add findings of fact to the order granting shock probation. It left the amended judgment of conviction granting shock probation which was signed on June 15th unchanged. Contrary to the State's contention, findings of fact are not a statutory prerequisite to the proper granting of shock probation.

ARGUMENT – REPLY TO GROUND FOR REVIEW ONE

REPLY: The Eighth Court correctly held that the trial court's order granting shock probation on June 15, 2015 is the "modification" of the final judgment or conviction that gives rise to the State's right to appeal under Article 44.01(a)(2). As pointed out by the Eighth Court, on June 15, 2015, the trial court also entered an amended judgment of conviction to reflect its ruling along with orders establishing the terms and conditions of community supervision. The amended order relied on by the State to salvage its appeal only added findings of fact and it did not modify the amended judgment or conditions of community supervision entered on June 15, 2015.

Contrary to the State's assertion, the Eighth Court did not read into article 44.01 an additional requirement that the appealed order be a first time, stand-alone order. The Eighth Court unambiguously and succinctly held that the only order modifying the judgment of conviction was the one entered on June 15, 2015. "The amended shock probation order signed by the trial court on June 25, 2015 added findings of fact, but it did not modify the amended judgment of conviction in any way." *State v. Hanson,* No. 08-15-00205-CR, 2017 WL 3167484, at *3 (Tex. App. July 26, 2017), petition for discretionary review granted (Nov. 1, 2017). As per the Eighth Court, the only appealable order was the one entered on June 15, 2015.

The State's argument fails on its face. The State repeatedly claims that article 44.01 "plainly states" that it may appeal an original or "amended" order. However, this is incorrect. Article 44.01 gives the State the right to appeal an order that "modifies a judgment." None of the language in 44.01 makes reference to an

"amended" order. The State's cited authority regarding the plain meaning of statutes and statutory interpretation is irrelevant to the issue decided by the Eighth Court. The Eighth Court's decision correctly focused on whether the June 25th order was an order that "modifies a judgment."

Further support for the Eighth Court's decision can be found in appellate rule 26.2(b) which states that notice of appeal by the State must be filed "within 20 days after the day the trial court enters the order, ruling, or sentence to be appealed." TEX. R. APP. P. 26.2(b). In this case, the order being appealed was the granting of shock probation reflected by the amended judgment of conviction along with orders establishing the terms and conditions of community supervision signed on June 15th. As correctly pointed out by the Eighth Court, the findings of fact filed on June 25th did not modify the amended judgment of conviction in any way. *Id.* *See also State v. Gobel,* 988 S.W.2d 852, 854 (Tex. App. – Tyler, 1999, no pet.) (Because original order of dismissal was not substantively changed by Nunc Pro Tunc Order, the State was required to perfect an appeal based on date of original order).

Contrary to the State's argument, the Eighth Court gave full effect to the plain language of article 44.01 and correctly dismissed the State's appeal for lack of jurisdiction.

ARGUMENT – REPLY TO GROUND FOR REVIEW TWO

REPLY: The Eighth Court correctly held that the three orders signed and entered by the trial court on June 15, 2015, were the only "modification" of judgment the State was entitled to appeal. In those three orders, the trial court granted shock probation, amended the original judgment of conviction to reflect the granting of shock probation and, established the terms and conditions of community supervision. The June 25th order from which the State attempted to appeal did nothing other than add findings of fact to the order granting shock probation. It made no changes or additions to the amended judgment of conviction or the conditions of community supervision signed on June 15th. Contrary to the State's contention, findings of fact are not a statutory prerequisite to the proper granting of shock probation.

I. The Eighth Court correctly focused on whether or not the trial court's June 25th order made any substantive changes to the judgment of conviction. Since it did not, the Eighth Court correctly found the June 25th order was not an appealable order.

The State acknowledges that this Court has previously held that the "second-judgment" rule developed in civil case law does not apply in the criminal context when an original order contained a ruling and the second order contained the "reasoning or legal conclusion supporting the ruling." *State v. Antonelli,* No. PD-958-01 (Tex. Crim. App. Sept. 11, 2002) (not designated for publication). Yet the State ignores this holding and argues, without any legal support, that the civil "second-judgment" rule is applicable in the criminal context.

The facts presented in this case are similar to those presented in *Antonelli*. In *Antonelli,* the trial court granted a motion to quash, then later entered findings of fact supporting its ruling. *Id.* This Court found that the second order, regardless of its

title, simply explained the trial court's reasoning and legal conclusions. *Id.* slip op. at 5. Consequently, it was not a "stand-alone" order that the State could appeal. The only appealable order was the original order granting the motion to quash.[1] *Id.* The only difference between this case and *Antonelli* is that the appealable order in this case granted shock probation instead of a motion to quash. Additionally, in this case, it is even more evident that the only appealable orders were those entered on June 15th because the trial court's grant of shock probation was accompanied by orders amending the judgment of conviction and outlining terms and conditions of community supervision. When the trial court added findings of fact to the order granting shock probation on June 25th, it did not make any changes to the amended judgment granting shock probation or the terms and conditions of community supervision.

II. There is no statutory requirement that the trial court enter findings of fact for the proper granting of shock probation.

The State claims that *Antonelli* is distinguishable because the trial court in this case was statutorily required to make findings of fact to support its ruling. State's Brief at 22. There is no such requirement. The shock probation statute states "The trial court has the authority to grant 'shock probation' in felony cases if a motion is

[1] The State was attempting to appeal the original order in *Antonelli* and its appeal was saved by this Court's holding that the original order was in fact, the appealable order.

filed within 180 days from the date the execution of the sentence actually begins, by either the court, state or defendant and, the trial judge believes that the defendant would not benefit from further incarceration." *See* TEX. CODE CRIM. PROC. Art. 42.12 § 6(a). There is no requirement that the trial judge make formal findings of fact.

Neither of the two cases cited by the State, *Dean* and *Lima*, stand for the proposition that the trial court is required to make findings of fact to support its decision. The issue in *Dean* was whether the defendant had to be incarcerated in the Texas Department of Criminal Justice prior to being granted shock probation. *State v. Dean,* 895 S.W.2d 814, 815 (Tex. App.–Houston [14th Dist.] 1995, pet. ref'd). There is no language in *Dean* stating that the trial court was required to make findings of fact prior to the granting of shock probation. The issue in *Lima* was whether the defendant was excluded from eligibility for shock probation because he was convicted of an excluded offense. *State v. Lima,* 825 S.W.2d 733, 734 (Tex. App.–Houston [14th Dist.] 1992, no pet.). Again, there is no language in *Lima* regarding any requirement that the trial court make findings of fact prior to granting shock probation.

Finally, the State cites dicta in *Ex parte Matthews,* 452 S.W.3d 8, 13-14 (Tex. App.–San Antonio 2014, no pet.) while ignoring the holding of *Gobel.* *See* State's

Brief at 25. Like *Antonelli, Gobel* held that a nunc pro tunc order that did not substantively change the original order was not an appealable order. 988 S.W.2d at 854. *Matthews* on the other hand, never addresses the issue because the findings of fact in that case were made after the trial court's plenary power to change the original order had expired. *Matthews,* 452 S.W. 3d at 13-14. Consequently, the findings were of no consequence. *Matthews* does hold, however, that the savings clause contained in Rule 306a of the Texas Rules of Civil Procedure is not applicable in the criminal context. 452 S.W. 3d at 11.

CONCLUSION

The Eighth Court gave full effect to the plain language of article 44.01. Article 44.01 makes reference to an order that modifies a judgment, not to an "amended" judgment as argued by the State. The only appealable orders in this case were those signed on June 15, 2015. The order signed on June 25, 2015 did not make any substantive changes to the original order granting shock probation and it made no changes at all to the amended judgment of conviction granting shock probation or the terms and conditions of community supervision, both of which were signed on June 15, 2015. Therefore, the June 25, 2015 order is not appealable and the Eighth Court correctly dismissed the State's appeal for lack of jurisdiction.

PRAYER

Appellee prays that this Court affirm the Eighth Court's judgment dismissing the State's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 27, 2018, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to petitioner's attorney: Raquel Lopez, raqlopez@epcounty.com.

I further certify that on January 27, 2018, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ruben P. Morales
Ruben P. Morales

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 2,204 words and complies with the applicable Rules of Appellate Procedure.

/s/ Ruben P. Morales
Ruben P. Morales